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IN THE

Supreme Court of the United States

October Term, 1955

No. 301

OLLIE KING, ET AL., *Petitioners,*

v.

LON H. CRON, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI

To the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio

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SUBJECT INDEX

	PAGE
CITATIONS TO OPINIONS BELOW	1
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	5
APPENDIX A	7
Judgment of the District Court	7
Judgment of Court of Civil Appeals	10

LIST OF AUTHORITIES

CASES

Buchanan v. Warley, 245 U.S. 60	4
New Orleans v. New Orleans Water Works Co., 42 U.S. 79	4
Shelly v. Kraemer, 334 U.S. 1	5

REVISED CIVIL STATUTES OF TEXAS

Article 1290	2, 4

ADDENDUM

Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C., Section 1257 (3).

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Petitioners Ollie King and Ernest King, pray that a writ of certiorari issue to review the judgment of the Court of Civil Appeals of Texas for the Fourth Supreme Judicial District entered in the above entitled case on December 14, 1955.

Citations to Opinions Below

The Judgment of the District Court of Victoria County, Texas is unreported and is printed in Appendix A hereof infra, p. 7 and is in the certified copy of the record. The opinion of the Court of Civil Appeals for the Fourth

Supreme Judicial District of Texas is in the certified copy of the record and is printed in Appendix A hereof, infra, p. 10.

Question Presented

Whether after a mineral deed selling to one Giestman and after both mineral deeds to one Wich, 3.52 percent or 9/256 of such minerals produced from the land herein described, remained in the grantors, their heirs and assigns, and is therefore presently the property of petitioners.

Statutes Involved

The statutory provisions involved are Article 1290, *Revised Civil Statutes of Texas*, 1925.

Statement

Petitioners, Ollie King and Ernest King, owners of the surface estate of a certain tract of land, brought an action of Trespass to Try Title seeking to eject the Respondents therefrom, in the District Court of Victoria County, Texas for the 24th Judicial District and to recover a certain interest in minerals underlying said lands which petitioners claimed remained in Martin Marshall and his wife, Jessie Mae Marshall, their heirs and assigns, after fractional mineral rights were severed and conveyed, by certain mesne and subsequent conveyances. The petitioners also allege that respondents on or about August 1949 unlawfully entered upon said premises and began operating gas and oil wells and taking oil and gas from thereunder.

Petitioners allege that the original owners, Martin Marshall and wife, sold by mineral deed to L. E. Giestman an un-

divided one-half interest in the minerals underlying such tract; the Marshalls subsequently by mineral deed sold to H. T. Wich an undivided one-fourth interest in and to all of the oil, gas and other minerals under the said land which Petitioners say was 1/4 of the 1/2 retained and not 1/4 of the minerals underlying the whole tract; later the Marshalls by Mineral Deed sold to H. T. Wich another 1/4 of all the oil, gas and other minerals in and under said land which petitioners claim is an additional 1/4 of the 1/2 interest retained by the Marshalls.

Petitioners further allege that since inception to June 1954 the production from the lease or leases conveying this tract of land has been 169,481 barrels and that presently petitioners own of that amount sold 5,958 barrels valued at approximately ($23,932.00), which is 3.52% of the total percentage of mineral rights under said land (R. p.), and further ask for damages in the total amount of $300,000.00, which amount includes ($100,000.00) which is the rental value of said premises during five years respondents have been in unlawful possession thereof. The interest herein claimed by petitioners is derivative under a one-eighth interest retained by Martin Marshall and wife, Jessie Mae Marshall, as original lessors of the mineral interest underlying the tract aforesaid, fractions of which were conveyed away by the Marshalls at various times to the aforesaid Giestman and Wich retaining at the time of each conveyance a fractional portion of the said 1/8 royalty interest originally retained.

On February 25, 1955 a pre-trial conference pursuant to Rule 166 of the Texas Rules of Civil Procedure was held before the District Court at which the parties entered into certain stipulations embodied in the Court's Order of that date (R. p.). By judgment rendered on March 12,

1955 the 24th District of Victoria County, Texas gave title and possession of the tract to Plaintiffs but denied all other relief asked for by Plaintiffs in their petition. From this Judgment Plaintiffs appealed to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas which affirmed the decision of the District Court (R. p.). Writ of Error to the Supreme Court of Texas was refused on March 7, 1956 without opinion.

Reasons for Granting the Writ

1. The decision of the State Court below in the instant case has been decided in a way not in accord with the applicable decisions of this Court. The holding of the Court of Civil Appeals clearly deprived petitioners of their property without due process of law. This is not in accord with the principles laid down by the Supreme Court of the U. S. in *New Orleans v. New Orleans Water Works Co.*, 42 U.S. 79, and *Buchanan v. Warley*, 245 U.S. 60. The latter of these two cases held a municipal ordinance void which prohibited white and colored persons from occupying houses in the same block where the majority of houses were occupied by persons of the other race. The Court then was of the opinion that there was a denial of due process under the ordinance which was only based on the invidious distinction of race. In the instant case it is apparent that the Court founded its ruling upon the invidious distinction of race, without the aid of any precedent and plainly divesting petitioners of their property rights.

That the Court based its distinction upon the aforementioned invidious distinction is further evinced by the refusal of the Court to adhere to the unambiguous language of Art. 1290 of the *Revised Civil Statutes of Texas* as follows: "All alienations of real estate, made by any person pur-

porting to pass a greater right or estate than such person may lawfully pass or assure, shall operate as alienation of so much of the right and estate in lands, tenements or hereditaments as such person might lawfully convey."

The lower court in the instant case further made its decision in conflict with *Shelly v. Kraemer*, 334 U.S. 1, wherein it was decided that State Courts cannot enforce restrictive covenants which provide that certain realty cannot be sold to Negroes, since such enforcement would deny equal protection of the laws in contravention of the 14th amendment to the U. S. Constitution. It is therefore evident action of a State Court can be such State action as will contravene the equal protection of the laws clause; and that when a State Court lends its processes to the function enforcing a claim, or recognizing an interest, as in the instant case, racially discriminatory in nature, it is within the spirit of the condemnation announced in *Shelley v. Kraemer*, supra.

2. The question herein presented is an important one because of its impact upon the question of Civil Rights and because it seeks to determine a question of substantive due process.

It is important to determine questions of violations of the due process and equal protection clauses of the 14th Amendment by State Courts which decide questions out of context, contrary to local statutory authority and for these reasons on the basis of race or color.

Conclusion

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted, Thos H Dent

Date: June 4, 1956

THOMAS H. DENT
Counsel for Petitioners

APPENDIX A

Judgment of District Court

No. 11,378

OLLIE KING, ET AL	§	In The
	§	
	§	DISTRICT COURT OF
vs.	§	
	§	VICTORIA COUNTY, TEXAS
	§	
LON H. CRON, ET AL	§	24th Judicial District

JUDGMENT

Pursuant to agreements made and action taken at a pre-trial conference on the 25th day of February, 1955, in this cause in which Ollie King and Ernest King are plaintiffs, and Lon H. Cron, E. J. Gracey, Brewer-Hixon Oil Company and Scurlock Oil Company are defendants, this cause was submitted to the court without a jury on the 25th day of February, 1955, and the court being fully advised;

It is, therefore, ordered, adjudged and decreed that the plaintiffs recover of and from the defendants the title to and possession of the following described land in Victoria County, Texas, to-wit:

> 82.75 acres of land, more or less, and being a part of the subdivision No. Four (4) lying southeast of the right-of-way of the St. L.B. & M. Ry. Co. and being the same land conveyed to Sanders Marshall by Geo. W. DuNah by deed dated November 1, 1910, and recorded in Volume 65 at page 610 of the Deed Records of Victoria County, Texas, to which deed and the record thereof reference is made for all purposes; the tract herein described being 37.62 acres of the S.A. &

M.G.R.R. Co. Survey No. 7, and 45.13 acres of the Francisco Perez One League Grant and the said land herein described being described by metes and bounds as follows:

Beginning at the intersection of the southwestern boundary line of said subdivision No. Four (4) with the right-of-way of St. L.B. & M. Ry.;

Thence South 35 degrees East with the southwestern boundary line of said subdivision No. Four (4) 684.4 varas to corner in same, said corner being the south corner of this tract and the west corner of a tract of 67-85/100 acres out of said subdivision No. Four (4) conveyed by Burton, Wilson and Wharton to W. B. Traylor;

Thence North 55 degrees East with the southeast boundary line of this tract and the northwest boundary line of the tract sold to Traylor 667 varas to corner in same for the eastern corner of this tract, said corner being also the southwestern corner of a tract of 82.75 acres conveyed by Geo. W. DuNah to Will King by deed dated November 1, 1910;

Thence North 35 degrees West 716 varas to corner in the southwestern boundary line of the right-of-way of the St. L.B. & M. Ry. Co., said corner being the north corner of this tract and the west corner of the tract sold to Will King;

Thence South 52-½ degrees West with the eastern boundary line of the right-of-way of the St. L.B. & M. Ry. Co. to the place of beginning, and being the same land sold to Martin Marshall by Sanders Marshall et ux by deed recorded in Volume 110 at page 146 of the Deed Records of Victoria County, Texas, to which reference is hereby made for all purposes, save and except, however, one acre out of the above described tract, being the same one

acre conveyed by Martin Marshall et al to Central Power & Light Company by deed dated July 26, 1929, and recorded in Volume 125 at page 418 of the Deed Records of Victoria County, Texas, to which record reference is hereby made for all purposes;

save and except all of the oil, gas and other minerals in and under and which may be produced from the above described land, and rights of ingress and egress to, from and on said land, including all surface and other rights in respect to said land incident and appurtenant to the said minerals and mineral title, provided, however, that in case there is no paying production of oil, gas or other mineral on said land on the 25th day of April, 1985, and for six months thereafter, an undivided one half interest in the oil, gas and other minerals in and under and which may be produced from said land shall revert to plaintiffs, their heirs and assigns, but should there be such production then and in that event such reversion shall not occur until such production shall thereafter cease, being the reversion or the possibility of reverter provided in a mineral deed from Martin Marshall and wife, Jessie Mae Marshall, to H. T. Wick dated April 25, 1935, recorded in Volume 149 at page 493 of the Deed Records of said county, and in a mineral deed from the same grantors to the said Wick dated October 22, 1935, recorded in Volume 151 at page 6 of said records, but such reversion shall not affect or impair the remaining undivided one half interest in said oil, gas and other minerals, being the interest conveyed to L. E. Geistman by correction mineral deed executed by Martin Marshall and wife, Jessie Mae Marshall, dated August 17, 1935, recorded in Volume 150 at page 120 of the Deed Records of said county.

It is further ordered, adjudged and decreed that, except as provided above in this judgment, the plaintiffs take nothing from the defendants, and that costs herein be taxed against the plaintiffs, for which let execution issue.

To all of which the plaintiffs in open court except and gave notice of appeal to the Court of Civil Appeals for the 4th Supreme Judicial District of Texas, sitting at San Antonio, Texas.

Rendered this———day of March, 1955.

_____

JUDGE

Approved as to form:

_____

Attorney for the Plaintiffs

_____

Attorney for the Defendants

Judgment of Court of Civil Appeals

Ollie King et al.,

Appellants,

No. 12898, v.

Lon H. Cron et al.,

Appellees.

Appeal from Victoria County.

This cause was submitted in this Court on September 7, 1955, and at the request of the parties oral argument was heard on the 23d day of November, 1955. At this time a

request was made to amend appellants' brief or file a substitute in lieu of the original, so that another and different theory might be urged as a ground for the reversal of the trial court's judgment. This request to amend the brief has been considered by the Court and is refused, as the amendment requested would require the filing of new and different points of error after the case had been submitted and unreasonably delay the disposition of the appeal in this Court.

Rule No. 414, Texas Rules of Procedure, provides that the appellant's brief shall be filed in the Court of Civil Appeals within thirty days after the filing therein of the transcript and statement of facts, if any. Rule 418 prescribes that such brief shall contain a statement of points upon which the appeal is predicated. The appellee is then allowed twenty-five days in which to file a brief in reply to that submitted by appellant. Rule 414. After parties have been allowed the opportunity to brief their respective contentions, the case is ready for submission to the Court for disposition. Litigants are entitled to a prompt and expeditious determination of appeals, and it is readily apparent that the effect of granting appellants' request would be to allow them to "start over" so to speak, and require a rebriefing by all parties. Although the briefing rules are to be liberally construed, Rules 422 and 431, they should not be so liberalized or extended so as to permit an appellant to completely change his grounds after submission of an appeal in the absence of most extraordinary circumstances. 3A Tex. Jur. 136, § 168.

The record in this case discloses additional reasons why the requested amendment should be refused. As a result of a pre-trial conference in the court below, the judge entered an order embodying numerous stipulations of the parties.

It was agreed that the court should construe certain mineral deeds in the light of these stipulations. The statement of facts in this case consists solely of certified copies of seven written instruments and by necessary inference the order of the trial judge above mentioned setting forth the stipulations of the parties.

The transcript discloses that appellants filed a "statement of points to be relied upon," in accordance with the provisions of Rule 377-a, which provides that,

> "For the purpose of inducing the opposing party to accept an abbreviated transcript or statement of facts, the appellant or the appellee, to the extent that he complains of the judgment or any part thereof, may file with the clerk of the trial court a statement of the points on which he intends to rely on appeal; and he shall thereafter be limited to such points."

Appellants having invoked the provisions of Rule 277-a, are necessarily bound thereby, and this Court may not consider grounds of error other than those set forth in said statement of points. Although a total of eight points were filed, they present the single contention that the trial court erred in holding that appellants held no interest in the minerals underlying a tract of 82.75 acres of land situated in Victoria, Texas, because their remote predecessors in title had executed four deeds which operated to convey the entire mineral interest prior to the date of the conveyance to appellants' immediate predecessor in title. The conveyances involved were: (1) deed from Martin Marshall and wife to L. E. Giestman, dated February 1, 1930, (2) correction deed from Martin Marshall and wife to L. E. Giestman, dated August 17, 1935, (3) deed from Martin Marshall and wife to H. T. Wick, dated April 25, 1935, and (4)

deed from Martin Marshall and wife to H. T. Wick, dated October 22, 1935.

The order entered at the conclusion of the pre-trial conference recited that it was agreed that the correction mineral deed to Geistman operated to vest in the grantee title to one-half of the minerals, and that the court should determine, without the aid of extrinsic evidence, whether each of the mineral deeds to Wick conveyed a one-fourth interest in the minerals or a one-fourth interest of whatever proportion of the minerals Marshall and wife owned at the date of the respective conveyances. In both of the deeds to Wick the property conveyed is described as, "an undivided one-fourth (¼th) interest in and to all of the oil, gas and other minerals in and under the" 82.75 acres of land involved. Both deeds also contained a provision for reverter "in case there is no paying production on said land on the 25th days of April, 1985, and for six months thereafter."

It is appellants' contention, that as Marshall and wife owned but one-half of the minerals at the time (April 25, 1935) they executed the first deed to Wick, such deed operated to convey but one-fourth of one-half of the minerals and that as Marshall and wife owned but three-eighths of the minerals (½ less ¼ of ½) when the second deed was executed (October 22, 1935), such conveyance passed title to only ¼ of 3/8 of the minerals, leaving the Marshalls vested with 9/32 of the minerals (3/8 less 1/4 of 3/8) which subsequently passed by mesne conveyances to appellants. As the parties agreed below that the deeds should be construed without the aid of extrinsic evidence, there can be no question of reformation in the case, and we find no basis for appellants' theory of construction contained in the wording of the deeds. Clemens v. Kennedy, Tex. Civ.

App., 68 S.W. 2d 321, wr. ref. The trial judge properly construed the deeds involved and its judgment denying appellants a recovery of any portion of the mineral estate underlying the 82.75 acre tract of land (save for the possibility of reverter to one-half the minerals as provided for in the Wick deeds) correctly settles the legal rights of the parties. Such judgment is accordingly affirmed.

JAMES P. NORVELL
Associate Justice

Opinion delivered and
filed December 14, 1955

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v.

LON H. CRON, ET AL., *Respondents*

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

Respondents, Lon H. Cron, E. J. Gracey, Scurlock Oil Company and Brewer-Hixon Oil Company, oppose the Petition for Writ of Certiorari for the reason that the petition and the certified record were not filed by Petitioners within the time required by law.

Statement

The Petition for Writ of Certiorari seeks the review of a judgment in a civil action by the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of

Texas; the date of the judgment was December 14, 1955 (see opening paragraph of the Petition for Writ of Certiorari). On March 7, 1956, the Supreme Court of Texas dismissed Petitioners' Application for Writ of Error to review the judgment (see the last sentence of the paragraph ending near the top of page 4 of the Petition for Writ of Certiorari). The Petition for Writ of Certiorari and accompanying record were not presented for filing and were not filed until after June 5, 1956, which was the ninetieth day after March 7, 1956, computed in accordance with Supreme Court Rule 34(1).

Authorities

Subsection (c) of Section 2101, Title 28, *United States Code*, in effect required the writ of certiorari to be applied for within ninety days after March 7, 1956. Rule 22(c) required the petition and the accompanying record to be filed with the clerk of this court within the time prescribed by law.

Conclusion

Respondents respectfully contend that the Petition for Writ of Certiorari should be dismissed.

CHARLES I. FRANCIS
I. M. WILFORD
Counsel for Respondents